No. 17-532

In The Supreme Court of the United States

CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

SUPPLEMENTAL BRIEF FOR RESPONDENT

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INTRODUCTION

The United States urges this Court to grant certiorari to review two questions it describes as purely legal. (U.S. Br. at 21). The views of the United States notwithstanding, this Court should deny the Petition.

First, the procedural history of this case prevents a decision on the two questions presented by the United States from affecting Clayvin Herrera's criminal conviction.

Second, if this Court accepts and reviews the questions presented by the United States, the grant of review itself will disrupt the final judgment issued by a federal district court, and affirmed by the Tenth Circuit, in *Crow Tribe of Indians v. Repsis*, 866 F. Supp. 520 (D. Wyo. 1994), *aff'd* 73 F.3d 982 (10th Cir. 1995). In so doing, this Court will undermine settled expectations of finality in a manner that is particularly pernicious in Indian law.

Finally, the questions presented by the United States assume that this Court's decision in *Minnesota v. Mille Lacs Band of Chippewa* [526 U.S. 172 (1999)] overruled its earlier decision in *Ward v. Race Horse* [163 U.S. 504 (1896)], but this was not the outcome urged by the United States or adopted by the *Mille Lacs* majority. In *Mille Lacs*, the United States argued that the two cases could be reconciled, and this Court agreed. The meaning of *Mille Lacs* advocated now by the United States does not reflect a "change in controlling law" but rather a change in the United States' arguments to this Court. If the United States

wants this Court to overrule *Ward v. Race Horse*, it should seek a case that does not present the collateral consequences that Court review would engender here.

ARGUMENT

I. This case presents a poor vehicle to answer the questions presented by the United States because the Petitioner has defaulted on an independent, alternative ground sufficient to sustain his conviction.

Even were this Court to conclude that the Crow Tribe's treaty hunting right persists, the State of Wyoming can regulate off-reservation treaty rights "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Dep't of Game v. Puyallup Tribe*, 414 U.S. 44, 45 (1973) (quoting *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 395, 398 (1968)). State conservation regulations must be "reasonable and necessary." *Id.*

The United States argues that this Court need not consider "whether enforcement of Wyoming's hunting laws against petitioner is 'reasonable and necessary for conservation.'" (U.S. Br. at 21). The United States asserts that "[t]he Wyoming district court did not address that issue." *Id.*

This statement is profoundly misleading. In this case, the **trial court** is the Wyoming "Circuit Court" for the Fourth Judicial District which has "original

jurisdiction in all misdemeanor criminal cases." Wyo. Stat. Ann. § 5-9-129. For misdemeanor convictions, the "Wyoming district court" mentioned by the United States acts only to "review the case on the record on appeal." Wyo. Stat. Ann. § 5-9-141.

When the Wyoming circuit court denied the Petitioner's motion to dismiss the charges against him, the judge rejected his argument that the State's regulations are not reasonable and necessary conservation measures. (*See* Pet'r's App. at 39-41). The court held that "[i]t is unreasonable for the defendant to believe or to even argue that he and other members of the Crow Tribe may hunt any game within the [Big Horn National Forest] without restriction." (*Id.* at 40). It noted that "even the Crow Tribe does not allow such unrestricted hunting in that part of the Big Horn Mountains which are within the Crow Reservation." (*Id.*). "If not for the continuing conservation efforts there would be no game to hunt." (*Id.*). The court found that the Crow Tribe has acknowledged the need for off-reservation hunting regulation, but it found "no evidence" that the Tribe provided such regulation itself. (*Id.* at 40 & n.4).

> Conservation is a necessity and the defendant, whether a Crow Tribal member or not, is subject to regulation. A hunter is regulated by the *Crow Tribe Law and Order Code* when hunting in the Big Horn Mountains on the Crow Reservation in Montana. He is likewise subject to Wyoming Game and Fish regulations when hunting in the Big Horn

> Mountains located within the [Big Horn National Forest] in Wyoming.

(*Id.* at 42-43).

Over the course of this litigation, the Petitioner has abandoned his appeal of this ruling. While he did challenge the conservation necessity of the Wyoming regulations in the Wyoming district court on appeal (*see* Sept. 13, 2016 Br. of Appellant at 17, 20-21), this is as far as the issue went. The Wyoming district court affirmed on other grounds. On appeal to the Wyoming Supreme Court, the Petitioner presented five questions in his petition for review, and not one of those issues mentions the circuit court's holding on conservation necessity. (*See* Petition for Writ of Review, *Herrera v. State*, (No. S-17-0129), at 7-8 (May 10, 2017)).

In Wyoming, "it is the responsibility of the appellant to specify clearly defined issues for [the Wyoming Supreme] Court's review." *Ultra Res., Inc. v. McMurry Energy Co.*, 99 P.3d 959, 962 (Wyo. 2004). "Assignments of errors control the scope of an appeal." *Id.*; *see also Amalgamated Food Emps. Union v. Logan Valley Plaza*, 391 U.S. 308, 313 n.6 (1968).

The Petitioner also did not raise the ruling on conservation necessity to this Court. His failure to challenge the trial court's decision that "conservation necessity" justifies Wyoming's hunting regulations makes that holding the law of the case and makes a decision by this Court advisory.

A "fundamental precept of common-law adjudication" is "that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983). "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States*, 562 U.S. 476, 506 (2011).

Even if the Petitioner were to prevail on the carefully worded questions presented to this Court by the United States, his conviction will stand unless the Wyoming circuit court disregards its prior ruling and grants Herrera a second opportunity to litigate the conservation necessity of Wyoming's hunting regulations.

Admittedly, the law of the case doctrine "directs a court's discretion" rather than imposing a mandatory "limit [on] the tribunal's power." *Id.* A Wyoming court could grant an exception to the law of the case if new evidence is available or the issue was not actually decided, but, in Wyoming, "[o]rdinarily, the law of the case doctrine requires a trial court to adhere to its own prior rulings, the rulings of an appellate court, or another judge's rulings in the case or a closely related case." *Lieberman v. Mossbrook*, 208 P.3d 1296, 1305 (Wyo. 2009).

Herrera's decision to abandon his appeal of the Wyoming circuit court's ruling on conservation necessity means that he has placed himself squarely into the routine application of this common procedural rule. The recognized exceptions do not apply, and the

federal nature of his claim does not affect the rule's application. This Court recognizes that a procedural default of this nature "is a question of local law, upon which the decision of the highest court of the State is controlling." *Moss v. Ramey*, 239 U.S. 538, 547 (1916). Any decision by this Court on the underlying treaty right, therefore, would be advisory.

II. This Court's review of the questions presented by the United States will disturb expectations of finality that benefit both Indian Tribes and the States.

States and the Indian Tribes have litigated in federal court throughout the history of this nation. The federal courts have already granted final judgment in favor of Wyoming and against the Crow Tribe on the very questions presented by the United States. A grant of certiorari by this Court, regardless of which party prevails on the merits, sends the signal to states and tribes that they need not accept the federal courts' decisions as final.

Federal litigation must present the opportunity for final resolution of a grievance. "[T]hat's why people bring their disputes to court in the first place: because the legal system promises to resolve their differences without resort to violence and supply 'peace and repose' at the end of it all." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003 (10th Cir. 2015) (Gorsuch, J.) (*Ute VI*).

Nowhere is this finality more important than in disputes between sovereign entities, such as Indian tribes and the States, which exist in perpetuity. The procedural history surrounding *Hagen v. Utah*, 510 U.S. 399 (1994), demonstrates why this is so.

In *Hagen*, this Court agreed to review a reservation boundary dispute that had already been determined by a final decision of the en banc Tenth Circuit. 510 U.S. at 408-09. Although the Court identified the preliminary question whether Utah should be "collaterally estopped" from relitigating the reservation boundaries, the Court declined to address the procedural bar because the tribal member not only "failed to raise" the argument but "also expressly refused to rely upon it in seeking a writ of certiorari." *Id.* at 410.

As the United States itself recognized, however, if left unchecked, the "gambit to avoid the binding effect of litigation in the federal courts by attempting to relitigate in state court potentially has far-reaching consequences for the finality and integrity of decisions in the federal courts." Memorandum of the United States as Amicus Curiae Supporting Petitioner's Motion for Injunctive Relief, *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 1992 U.S. Dist. Ct. Motions LEXIS 18 at *6 (D. Utah 1992); *see also Ute Indian Tribe of the Uintah & Ouray Reservation v. Myton*, 835 F.3d 1255, 1257 (10th Cir. 2016) (*Ute VII*).

The United States now seeks to reopen a case that is procedurally identical to *Hagen*, with two wrinkles:

(1) it is the Tribe seeking to undo the final judgment in a prior case it lost, not the State of Wyoming; and (2) Wyoming has raised the procedural bar of collateral estoppel stemming from the earlier final decision in *Repsis* on the very tribal hunting right that the Petitioner and the United States claims is the issue here.

In *Crow Tribe v. Repsis*, both the State of Wyoming and the Crow Tribe of Indians—two sovereigns—submitted their dispute over the very hunting regulations at issue in this case to the courts of the United States. The federal courts provided a final answer: the Crow Tribe's suit for a declaratory judgment that the tribe had a hunting right in Wyoming was denied and the suit dismissed by the federal district court with prejudice. Oct. 24, 1994 Order Granting Defendants' Motion for Summary Judgment and Dismissing Complaint, *Crow Tribe v. Repsis*, No. 92-cv-1002, Doc. 60. *See also* Complaint, *Repsis*, J.A. Vol. I at 6 (seeking judgment declaring Crow Tribe retains its "treaty-reserved off-reservation hunting and fishing rights" and an injunction prohibiting interference by Wyoming officials).

The Tenth Circuit affirmed the district court's judgment on the grounds that Article IV of the Treaty with the Crows expired when Wyoming became a state, *Crow Tribe v. Repsis*, 73 F.3d 982, 989-93 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996). But this was not the only Tenth Circuit holding that supported the district court's final judgment.

The Tenth Circuit also held that the Bighorn National Forest is occupied, and, as a result, even if the Crow treaty right persists, it cannot be exercised there. *Id.* at 993. Finally, the Tenth Circuit concluded that if the Crow Tribe's treaty hunting right persists, Wyoming can regulate off-reservation treaty rights "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Repsis*, 73 F.3d at 992-93 ("[I]f the Treaty with the Crows, 1868, had reserved a continuing right which had survived Wyoming's admission, we hold there is ample evidence in the record to support the State's contention that its regulations were reasonable and necessary for conservation.").

Herrera violated the same conservation statute considered by the *Repsis* court: Herrera took a big game animal without a license, and he did so during a closed season that prohibits all hunting for the purpose of conserving the species. *Compare id.* at 985, *with* (Pet'r's App. at 5). The *Repsis* record included testimony about how closed seasons in winter, spring, and summer are needed for conservation to allow big game species to survive through the Wyoming winter and raise new calves. *See Repsis*, J.A., Vol. I at 265-66 and 271-73.

The United States now argues that the Tenth Circuit's holdings were incorrect, but the case between the Crow Tribe and Wyoming is over. Once adjudicated, the resolution of this dispute between these two parties is final.

To evade the final judgment in *Repsis*, the United States argues that the first rationale has been overruled by this Court *sub silentio* and the Wyoming district court (the appellate court here) did not give preclusive effect to the other two holdings. (U.S. Br. at 20). But as an appellate court, the Wyoming district court did not need to decide the preclusive effect of the other holdings because collateral estoppel precluded relitigation of the primary holding in *Repsis*.

Nor are the United States' questions presented "purely legal" in nature, such that no further development of the record is necessary for this Court to reinterpret the treaty. (U.S. Br. at 21-22). On appeal the state district court properly recognized, "[t]he determination of the validity of the off-reservation treaty right is a mixed question of law and fact." (Pet'r's App. at 24-25). Article IV of the Treaty with the Crows recognizes a conditional right that expires upon the happening of certain events. Whether any or all of those events have occurred is a matter of fact, not law. This is true whether the fact is statehood, occupation, or peace on the borders of the hunting districts. As such, even if the fact at issue is not in dispute, collateral estoppel bars relitigation of the application of that fact to the law set forth in the Treaty.

Since 1995, the Crow Tribe has known that each holding in *Repsis* is an independent basis that sustains the final judgment: the Tribe petitioned for certiorari on all three holdings. (*See* Pet. 7, 22, 24, United States Supreme Court doc. no. 95-1560); *see also, e.g.*, *Cohen's Handbook of Federal Indian Law* § 1804[2][e] at 1172

(Nell Jessup Newton ed. 2012) ("The outcome in *Crow Tribe v. Repsis* is not affected by *Mille Lacs*, because the Tenth Circuit made an alternative holding that the national forest lands in question were not unoccupied lands.").

A decision by this Court to reopen the final judgment in *Repsis* presents a disruption like the one in *Hagen* that has undermined finality in Utah for decades. It is therefore somewhat inexplicable why the United States would ask this Court not only to reinterpret the Crow treaty but to do so without extensive lower court evidence on the intent of the parties, the history of the negotiations, their purpose, the context in which they occurred, and the practical construction adopted by the parties. *See Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979).

The two parties in this case are the State of Wyoming and an individual in privity with the Crow Tribe, who claims a tribal hunting right. The *Repsis* final judgment binds both sovereigns, and it should remain undisturbed. "A system of law that places any value on finality—as any system of law worth its salt must—cannot allow intransigent litigants to challenge settled decisions year after year, decade after decade, until they wear everyone else out." *Ute VI*, 790 F.3d at 1012. A grant of certiorari in this case, regardless of outcome, undermines the finality of judgments.

III. Should this Court grant review, this case presents deeper legal issues than the limited application of *Mille Lacs* urged by the United States.

The United States asserts that *Mille Lacs* repudiated *Race Horse* (U.S. Br. at 19), effectively overruling that earlier decision. But this Court did not so hold. *See, e.g.*, *Cohen's Handbook of Federal Indian Law* § 1807[5] at 1198 (noting that *Mille Lacs* avoided overruling *Race Horse* in its entirety).

The Court in *Mille Lacs* expressly acknowledged the alternative holding of *Race Horse* that Congress did not intend the language "the right to hunt on the unoccupied lands of the United States" to survive Wyoming statehood. 526 U.S. at 206. It distinguished the treaty in *Mille Lacs* on its facts, noting that the rights it guaranteed were "unlike the rights at issue in *Race Horse*[.]" *Id.* at 207. As Justice O'Connor acknowledged just two years before she wrote for the Court in *Mille Lacs*, when this Court decides to overrule prior precedent, it does not do so by implication. "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The decision not to overrule *Race Horse* was the outcome sought by the United States using the reasoning that the United States advanced in its brief in *Mille Lacs*. *See* Brief for the United States, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (No. 97-1337), 1998 U.S. S. Ct.

Briefs LEXIS 416, *44-45. The United States did not argue that the Court needed to overrule *Race Horse* to find for the Mille Lacs Tribe.

Now the United States asserts that *Mille Lacs* and *Race Horse* are incompatible. (U.S. Br. at 11-12.) If this is so, then this Court has considerable freedom to reconcile the two opinions. The doctrine of *stare decisis* certainly does not require this Court to overturn a precedent of more than 100 years in favor of another decision less than 20 years old.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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